Reportable

IN THE HIGH COURT OF SOUTH AFRICA

[CAPE OF GOOD HOPE PROVINCIAL DIVISION]

CASE NO: 2251/2004

In the matter between:

ERF 1026 TYGERBERG CC
t/a ASPEN PROMOTIONS SA **Appellant**

and

PICK 'N PAY RETAILERS (PTY) LIMITED **Defendant**

JUDGMENT DELIVERED ON 31st AUGUST 2005

HJ ERASMUS, J

[1] The plaintiff, Erf 1026 Tygerberg CC t/a Aspen Promotions SA ("Aspen Promotions") claims damages from the defendant, Pick 'n Pay Retailers (Pty) Ltd ("Pick 'n Pay"), for alleged breach of contract. The claim arises from a contract which Aspen Promotions concluded with Pick 'n Pay for the supply of bandanas printed with sunflowers. Aspen Promotions alleges that Pick 'n Pay repudiated the contract and that Aspen Promotions

accepted the repudiation.

[2] Aspen Promotions claims damages under two heads. Firstly, it claims its own loss of profit in an amount of R435 000.00. Secondly, it claims the loss of profit, for which it alleges it is being held liable, allegedly suffered by Andrew Spann t/a DFH Interiors ("DFH Interiors"), the entity which had been contracted by Aspen Promotions to manufacture the bandanas.

[3] Pick 'n Pay excepted to the Particulars of Claim on two grounds. At the hearing, Mr PBJ Farlam who appeared with Mr C Tsegarie for Pick 'n Pay, did not pursue the first ground of exception which is concerned with the claim for the loss of own profit suffered by Aspen Promotions. In what follows, I accordingly deal only with the second ground of exception which concerns the claim for damages which arises from the loss of profit allegedly suffered by DFH Interiors.

[4] In paragraphs 11, 12, and 13 of its amended Particulars of Claim the plaintiff alleges:

> 11. During July 2003 and at Bellville and/or Durbanville, Plaintiff as represented by Helen Boucher and Andrew Spann t/a DFH Interiors entered into an agreement in terms of which Andrew Spann t/a DFH Interiors would manufacture the 300 000 printed bandanas for Plaintiff at a cost of R4-55 per bandana which total R1 365 million.
>
> 12. At the time of this agreement Plaintiff knew that Andrew Spann t/a DFH Interiors' profit from this agreement would amount to R1-43 per bandana, equaling R429 000.00.
>
> 13. As a result of Defendant's abovementioned repudiation Plaintiff has breached the agreement with Andrew Spann t/a DFH Interiors and Andrew Spann t/a DFH Interiors is holding Plaintiff responsible for its loss of profit of R429 000.00.

[5] In paragraph 14 it is further alleged that at the time that the agreement was entered into, the plaintiff and the defendant were aware of the fact that the plaintiff would engage a manufacturer to manufacture the bandanas and that the manufacturer would make a profit out of the manufacturing of the bandanas. In paragraph 14.3 it is alleged that the parties were aware that -

> 14.3 In the event of Defendant repudiating or breaching the agreement with Plaintiff and the agreement being cancelled, the manufacturer will suffer a loss of profit for which Plaintiff would be liable.

In the result, the plaintiff in paragraph 15 claims an amount of R429 000.00 from Pick 'n Pay for damages it "has suffered" arising from the loss of profit suffered by DFH Interiors.

[6] The gist of the second ground of exception is contained in paragraphs 11, 13, 14 and 15 of the Notice of Exception:

> 11. All that is alleged in respect of that claim, however, is that an agreement was purportedly concluded between Plaintiff and Andrew Spann t/a DFH Interiors from which the latter would purportedly derive a profit of R429 000.00 (paragraphs 11 and 12) and that Andrew Spann t/a DFH Interiors "is holding Plaintiff responsible for its loss of profit of R429 000.00".

12. …..

> 13. The remainder of the Amended Particulars (and Plaintiff's Rule 35(12) and (14) Reply) accordingly does not support the allegation in paragraph 15 of the Amended Particulars that Plaintiff has already suffered damages of *inter alia* R429 000.00. At worst for Plaintiff, it is confronted with an oral demand from Andrew Spann t/a DFH Interiors for payment of R429 000.00 which might potentially be successful, in whole or in part, were it

ever to be reduced to a legally cognisable document and prosecuted to finality.

14. In the circumstances, the paragraphs 13 and 15 of the Amended Particulars are inconsistent and contradictory, and accordingly vague and embarrassing.

15. In addition and in any event, the Amended Particulars lack averments necessary to sustain a cause of action relating to damages allegedly suffered by plaintiff pursuant to an agreement purportedly concluded between it and Andrew Spann t/a DFH Interiors.

[7] Central to Pick 'n Pay's case are the contentions (a) that there is no indication that Aspen Promotions has as yet suffered any damage arising from DFH Interiors alleged loss of profit, and (b) that the plaintiff's case is founded upon two materially different claims and to sustain those claims, materially different facts would need to be proved; that is, that the *facta probanda* of the two claims are materially different.

[8] Mr Farlam suggested two possible avenues of redress against Pick 'n Pay which Aspen Promotions could pursue. First, should it be sued by DFH Interiors, the plaintiff could issue a third party notice against Pick 'n Pay in terms of Rule of Court 13. Pick 'n Pay would then plead to that claim, as well as contest the liability of Aspen Promotions to DFH Interiors. Alternatively, Aspen Promotions could defend the action and, in the event of it being ordered to pay DFH Interiors any damages, sue Pick 'n Pay for such damages.

[9] Mr ES Grobbelaar, who appeared on behalf of the plaintiff, submitted that in terms of the so-called "once and for all"-rule, the plaintiff is obliged

to claim in one claim for all the damage it may suffer as a result of the defendant's repudiation. He further submitted that DFH Interior's claim against Aspen Promotions becomes due when DFH Interiors suffers a loss as a result of the breach of contract by Aspen Promotions (*Kantor v Welldone Upholsterers* 1944 CPD 388 at 391; *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1979 (4) SA 905 (W) at 908H; *Pohl v Prinsloo* 1980 (3) SA 365 (T) at 371C—E). In paragraph 13 of the amended Particulars of Claim it is alleged that DFH Interiors has suffered a loss of profits as a result of the breach of contract by Aspen Promotions, and that it is holding Aspen Promotions responsible for the loss.

[10] The usual purpose of an award of damages for breach of contract is that the sufferer by such a breach should be placed in the position he or she would have been had the contract been performed, in so far as that can be done by the payment of money, and without hardship to the defaulting party (*Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22). In principle, a party aggrieved by a breach of contract is entitled to claim as damages his bargain in the sense of what he would have gained if the contract had been properly performed, as well as his loss in the sense of the expenditure he would not have incurred if the contract had not been entered into. An aggrieved party can thus claim damages for the profit he or she would have received had the contract been honoured (his expectation interest, or positive *interesse*) and for out-of-pocket expenses (his restitution and reliance interests, or negative *interesse*) (see *Mainline Carriers (Pty) Ltd v Jaad Investments CC and Another* 1998

(2) SA 468 (C) 474B--485F (par [12] to par [60]); Christie *The Law of Contract* 4th ed (2001) 631).

[11] In *Mainline Carriers (Pty) Ltd v Jaad Investments CC and Another, supra,* at 479D--F (par [35] and [36]) Farlam J (as he then was) refers with approval to the conclusion reached by Prof Gerard Lubbe that the *interesse* principle of South African law "properly handled" leads to results broadly similar to those obtained by means of the interest analysis of Anglo-American law ("The Assessment of Loss upon Cancellation for Breach of Contract" (1984) 101 *SALJ* 616--640). Prof Lubbe concludes (at 623):

> As such, it [the interest analysis of Anglo-American law] is of considerable utility in that the identification of the possible components of a permissible recovery circumvents the difficulties inherent in the application of the abstract *interesse* theory to concrete situations.

[12] Prof Lubbe further points out (at p 622) that the interest analysis of American law gives recognition not only to the restitution interest and reliance interest of a plaintiff, but also to his or her indemnity interest --

> which relates to losses suffered on account of the aggrieved party's having to pay damages to a third party as a result of the defendant's breach of contract.

[13] Aspen Promotions claims (a) damages for loss of profits; that is, a claim for its expectation interest, and (b) damages for the loss it suffers as a result of the claim of DFI Interiors for Aspen Promotions' breach of contract; that is, a claim that may, in terms of interest analysis, be categorised as a claim for the plaintiff's indemnity interest.

[14] The objections raised by Mr Farlam all pertain to the issues of causation, quantum and proof. Thus, for example, it is complained that the loss of profit which DFH Interiors has allegedly suffered is not evidenced by any written document, that DFH Interiors has not launched any legal proceedings to claim its damages, that Aspen Promotions is at worst faced with a contingent liability for the amount DFH Interiors has claimed, and that the issuing of a demand for payment of damages flowing from a breach of contract does not in law mean that the recipient is liable to pay the demanding party such damages. These are issues to be canvassed at an eventual trial.

[15] In view of the foregoing, the second ground of exception cannot be upheld.

Rule of Court 23(1)

[16] Rule of Court 23(1) provides as follows:

> Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period allowed for filing any subsequent pleading, deliver an exception thereto and may set it down for hearing in terms of paragraph (f) of subrule (5) of rule (6): Provided that where a party intends to take an exception that a pleading is vague and embarrassing he shall within the period allowed as aforesaid by notice afford his opponent an opportunity of removing the cause of complaint within 15 days: Provided further that the party excepting shall within ten days from the date on which a reply to such notice is received or from the date on which such reply is due, deliver his exception.

[17] On 6th August 2004 Pick 'n Pay filed a notice in terms of the rule in which it set out the grounds on which it intended to take exception to the Particulars of Claim on the ground that they disclosed no cause of action and

moreover were vague and embarrassing. In the notice, it called upon the plaintiff to remove the causes of complaint which render the Particulars of Claim vague and embarrassing. Aspen Promotions amended its Particulars of Claim but Pick 'n Pay considered that the deficiencies were not cured by the amendment and accordingly filed a further notice under Rule 23(1). This time, Aspen Promotions did not amend its Particulars of Claim. Instead, it filed a "Reply to Defendant's Notice in terms of Rule 23(1)" which reads as follows:

1. AD PARAGRAPHS 1 T0 6 AND 8 TO 12 THEREOF

1.1 Paragraphs 3 to 6 of Plaintiff's amended Particulars of Claim sets out the sequence of events leading up to the conclusion set out in paragraph 7 of the said Particulars of Claim.

1.2 It is denied that paragraphs 3 to 7 of the Amended Particulars of Claim are vague and embarrassing or that paragraphs 3 and 6 of the Amended particulars of Claim are inconsistent with paragraph 7 thereof.

2. AD PARAGRAPH 7 THEREOF

2.1 When Plaintiff alleges in paragraphs 3 and 5 of the Amended particulars of Claim that annexures "A" and "B" were given to Defendant "via the Sunflower Fund" it meant that annexures "A" and "B" was sent to the Sunflower Fund who passed it on to Defendant.

2.2 The Sunflower Fund was facilitating the agreement between Plaintiff and Defendant.

3. AD PARAGRAPHS 13 TO 18 THEREOF

3.1 Paragraphs 13 and 15 of the Amended particulars of Claim are not inconsistent, contradictory or vague and embarrassing.

3.2 In law, Plaintiff suffers the damages of R429 000.00 relating to

Andrew Spann trading as DFH Interiors when they hold Plaintiff responsible for this loss of profit and not when such claim for loss of profit is upheld by the Court or paid by Plaintiff.

4. AD PARAGRAPH 19 THEREOF

The agreement between Andrew Spann trading as DFI Interiors and Plaintiff is properly set out in paragraphs 11 to 13 of Plaintiff's Amended particulars of Claim and sustains a cause of action relating to damages suffered.

[18] In paragraph 3 of its first ground of exception, that is the exception to the claim for Aspen Promotions' own loss of profits, Pick 'n Pay stated with reference to the "Reply to Defendant's Notice in terms of Rule 23(1)":

3. It is unclear what the legal effect of Plaintiff's Reply (for which no provision is made in the Uniform Rules) is intended to be, and more particularly whether:

3.1 Defendant is intended to regard the Amended Particulars as being impliedly amended to reflect the averments or explanations contained in Plaintiff's Reply;

3.2 Plaintiff's Reply is intended purely for Defendant's edification, and is not intended to have any formal status; or

3.3 Plaintiff's Reply is intended to be a self-standing document forming part of the official pleadings.

[19] Though Pick 'n Pay did not at the hearing pursue the first ground of exception, it will be expedient if I deal briefly with the purely procedural issue of what form the response to a notice in terms of Rule 23(1) should take.

[20] The Rule requires that a party be given the opportunity to "remove the cause of complaint". Though the "cause of complaint" is usually removed by way of amendment of the pleading in question, the Rule does not specify any form the removal of the complaint has to take. In *National Union of South African Students v Meyer; Curtis v Meyer* 1973 (1) SA 363 (T) at 367A—C Claassen J states:

> I am of the opinion that the opportunity afforded to remove the cause of complaint is not restricted to an opportunity to apply for an amendment. Similarly the reply in an endeavour to remove the cause of complaint is not restricted to an application for leave to amend. I think the simple answer is that if the reply, in whatever form it may be, does remove the cause for complaint the object of the Rule will have been achieved.
>
> It seems to me that if the reply is relevant and contains the necessary particulars, the reply must be treated as incorporated in the pleading.

[21] The learned Judge adds (at 367D) that the practice adopted in that case of furnishing particulars rather than amending the pleadings is not to be encouraged.

[22] Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th ed by Van Winsen, Cilliers and Loots (1997) 488 footnote 9 suggest that the option to furnish further particulars may continue to exist despite the fact that the procedure for furnishing further particulars to pleadings in response to a request to do so has been abolished.

[23] I share the view of Claassen J that an amendment of the pleading in

question is preferable to furnishing further particulars. In fact, I would endorse the submission of counsel for the plaintiff in *National Union of South African Students v Meyer; Curtis v Meyer, supra,* at 364H that a party faced with a notice under Rule 23(1) has only two courses open to him or her: either to amend the pleading in question and include in the amendment whatever particulars he or she wishes to furnish, or in the alternative to stand by the pleading and face the risk of an exception.

[24] In this matter, Aspen Promotions in its endeavour to remove the cause of complaint not only furnished further particulars, but also included argumentative matter in its response to Pick 'n Pay's notice in terms of Rule 23(1). The inclusion of such matter in a reply to a notice in terms of Rule 23(1) is wholly inappropriate.

[25] I make the following order:

The exception is dismissed with costs.

HJ ERASMUS, J